SUNDRA RAJOO NADARAJAH A

v.

CHONG LEE SIONG

HIGH COURT MALAYA, KUALA LUMPUR B
HAMID SULTAN ABU BACKER JC
[ORIGINATING SUMMONS NO: R2-24-02-2009]
22 JULY 2009

ARBITRATION: *Arbitrator - Claim for arbitrator's fee - Appointment of arbitrator terminated by order of court before commencement of arbitration hearing - Claim by arbitrator to be paid fee from security for costs held by PAM - Claim objected to by one party - Whether arbitrator entitled to claim fee - Whether proper for PAM to request for costs to be taxed - Whether PAM obliged to refund deposit to parties where there is an objection to fee - Security for costs held by PAM in trust - Whether PAM as stakeholder should have interpleaded* C D

The plaintiff was appointed as arbitrator by PAM in respect of a dispute between third parties. The proceedings had commenced but before the hearing one of the parties to the arbitration managed to get an order from the court to remove the arbitrator. In consequence of the removal, the plaintiff wrote to PAM to pay a sum of RM7,460 from the security for costs of RM10,000 held by PAM. One of the parties to the arbitration proceedings objected to the arbitrator's claim. PAM therefore requested the plaintiff to proceed to tax costs in court. The plaintiff replied that it is not proper for PAM to request the plaintiff to tax costs. The plaintiff commenced this action seeking payment from the security of costs held by the defendant as stakeholder in respect of the plaintiff's fees. E F G

Held (allowing the plaintiff's claim with costs):

(1) Just because detailed bill was not furnished by the plaintiff, it was not (necessarily) proper for PAM to request the plaintiff to tax costs. The only persons who can request for the bill to be taxed are the parties to the proceedings. PAM was holding security for costs as admitted in trust and not otherwise. (para 8) H

(2) The argument by the defendant that the arbitrator was removed before the hearing commenced and in consequence was not entitled to costs did not have merits. Fee entitlement begins from the course of the proceedings and after the commencement I

of the proceedings. In ordinary circumstances, the commencement of proceedings will take place the moment the arbitrator accepts his appointment, subject to agreed terms and issues, letters or directions, unless otherwise stated by any provision of law or rules etc. (para 8)

(3) When there is objection to fee, PAM is not obliged to refund the deposit to the relevant parties without the settlement of that dispute. PAM was the stakeholder and in the light of the dispute could have applied to interplead which would have protected itself and also secured the arbitrator's fees from the security deposit pending the court's determination. (para 8)

Case(s) referred to:

Port Sudan Cotton Co v. Govindasamay Chettiear & Sons [1977] 1 Lloyds' Rep 166 ***(refd)***

For the plaintiff - Ernest Azad; M/s Ernest Azad & Assocs
For the defendant - Deejinder Kaur; M/s David Lingam & Co

Reported by Amutha Suppayah

JUDGMENT

Hamid Sultan Abu Backer JC:

[1] This is my judgment in respect of the plaintiff's application seeking payment from the security of costs held by the defendant as stakeholder in respect of the plaintiff's fees. The prayer *inter alia* reads as follows (a) A declaration that Persatuan Arkitek Malaysia (PAM) pursuant to the PAM Arbitration Rules 1997 acted as a legal stakeholder for security of the deposit which was paid towards the costs of arbitration, (b) A declaration that the plaintiff as an arbitrator approved under the PAM Arbitration Rules is entitled to draw down his costs from the security held by PAM as a stakeholder, (c) That the defendant pays the sum of RM7,460 from the security of costs which was received by PAM to the plaintiff as the plaintiff's costs for the conduct of the arbitration.

Brief Facts

[2] The plaintiff was appointed as arbitrator by PAM in respect of a dispute between third parties. The proceedings had commenced but before the hearing one of the parties to the arbitration managed to get an order from the court to remove the arbitrator. In consequence of the removal, the plaintiff wrote to PAM to pay a

sum of RM7,460 from the security for costs of RM10,000 held by PAM paid by both the parties to the arbitration proceedings pursuant to PAM rules. One of the parties to the arbitration proceedings objected to the arbitrator's claim on the ground the arbitrator had been removed and in consequence is not entitled to fees and also requested for particulars in respect of the bill. PAM wrote to the plaintiff of the objection and requested the plaintiff to proceed to tax costs in court. The plaintiff replied that it is not proper for PAM to request the plaintiff to tax costs. The plaintiff's solicitors put PAM on notice of the following matters: (i) PAM acts as stakeholder of the security deposits for the arbitrator under the PAM Arbitration Rules; (ii) PAM is not entitled to decide on the issue of the Arbitrator's fee raised by one of the parties; (iii) PAM is not empowered to refund security deposit held by it as stakeholder to one of the parties to the arbitration merely on its demand.

[3] It must be noted that the claimant's solicitors did not object to the plaintiff's request to draw down his fees. The said solicitors also proposed alternatively, that PAM ought to seek legal advice on applying to court for relief as an inter pleader and let the court decide on the dispute.

[4] PAM though having stated in one of the letters that they are holding the money in trust released the security deposits to the relevant parties. In consequence, the plaintiff is seeking the above remedies.

[5] The defendant says that the plaintiff is not entitled to the said costs and submits as follows:

(i) Rules 5 provides for security towards costs and payment. Rules 5 – Securities Toward Costs And Payments.

(x) The arbitrator in deciding the cost of the award shall comply with the provisions of Section 19(1) of the Arbitration Act 1952.

Section 19(1) Arbitration Act 1956 provides for Costs

19. Costs

(1) Unless a contrary intention is expressed therein, every arbitration agreement shall be deemed to include a provision that the costs of the reference and award shall be in the discretion of the arbitrator or umpire who may direst to and by whom and in what manner those costs or any part thereof shall be paid, and may tax or settle the amount of costs to be so paid or any part thereof, and may award costs to be paid as between solicitor and client.

(i) Further Rules 5(xi) provides that:

(xi) During the course of the proceedings and after the commencement of the hearing, the arbitrator shall be entitled to draw down his fees from the arbitrator's security towards cost lodged by the parties with PAM less the 7 1/2% of PAM's administrative and co-ordinating charge.

Provided always that:

(a) The arbitrator shall notify the parties of the amount of fees to be drawn down;

(b) Such amount drawn down do not exceed the fees due to the arbitrator at that point in time; and

(c) The parties to the arbitration do not object to the said drawing down by the arbitrator with fourteen (14) days of the said notification.

...

(ii) It is humbly submitted that costs are to paid during the course of the proceedings and after the commencement of the hearing. There the hearing had not commenced and the plaintiff was removed as an arbitrator *vide* court order dated 07.04.05

(iii) It is further provided in the proviso of Rule 5(xi) that the arbitrator shall be entitled to costs provided there is no objection. Have there was an objection from the solicitors for the claimant within 14 days.

(iv) It is humbly submitted that Rule 6(i) provides that the rate is RM200.00 per hour computed on basis of actual time spent by Arbitrator in hearing and completing the arbitration. The plaintiff has failed to give a breakdown of how the plaintiff derived the sum of RM7,460.00. There is no statement from the plaintiff or a bill enumerating the actual time spent and discounts. The plaintiff has ignored the defendant's letters requesting for a taxed bill of costs.

[6] In addition the defendant says:

(a) It is generally accepted that an arbitrator who fails to make a award is not entitled to claim any remuneration for the arbitration.

(b) An arbitrator or empire will not be entitled to remuneration if the arbitration terminates due to his actual misconduct.

(c) Learned Author of "*the Law and Practice of Commercial Arbitration in England* (Second Edition), Sir Michael J. Mustill and Steward C Boyd say:

> ... that an arbitrator forfeits his remuneration if his part in the arbitration comes to an end through removal or revocation of authority on the grounds of his own fault.

[7] And concludes as follows: (i) the plaintiff has not complied with rules in the PAM Arbitration Handbook; (ii) that there was objection by one of the parties to the arbitration in respect of the drawdown of fees by the plaintiff within the stipulated time period; (iii) the plaintiff has failed and/or refused to tax the costs, (iv) the plaintiff has been removed as an Arbitrator by a court order as the plaintiff had misconducted in the proceedings; (v) delay by the plaintiff in making his claim, 19 months after being informed the security deposit will be refunded to respective parties.

[8] I have read the origination summons, affidavits, exhibits, submission of parties in detail. I take the view that the plaintiff's originating summons must be allowed. My reasons *inter alia* are as follows:

(a) In this case, PAM has not requested from the plaintiff a detailed bill. The plaintiff is obliged to give a detailed bill relating to the fees. The request for detail in respect of fees was requested by one of the parties to the arbitration but not PAM. In consequence, the submission of the defendant that PAM had requested for detailed bill of costs is not correct.

(b) In any event, just because detailed bill was not furnished by the plaintiff, it was not proper for PAM to request the plaintiff to tax costs. The only persons who can request for the bill to be taxed must necessarily be the parties to the proceedings. PAM was holding security for costs as admitted in trust and not otherwise.

(c) The argument by the defendant that the hearing had not commenced and the arbitrator was removed before the hearing and in consequence is not entitled to costs does not have merits. Rule 5(ix) states that fee entitlement begins from the course of the proceedings and after the commencement of the proceedings. In ordinary circumstances, the commencement of proceedings will take place the moment the arbitrator accepts his appointment, subject to agreed terms and issues, letters or directions, unless otherwise stated by any provision of law or rules etc;

(d) When there is objection to fee, PAM is not obliged to refund the deposit to the relevant parties without the settlement of that dispute. The duty as stakeholder is an onerous one and any breach will oblige PAM to compensate the aggrieved. As a general rule arbitrators are entitled to fees, both at common law and/or the relevant provisions of the Act or rules etc. The learned authors of the "*Law and Practice of International Commercial Arbitration*", 2nd edn, Alan Redfern and Martin Hunter stated:

> where an arbitration is conducted under auspicious of an arbitral institution, it is unnecessary for the parties to engage in any direct discussion or negotiation with the Arbitrator or Arbitrators as to the amount of his fees or their fees, these are fixed by the institution, sometimes acting independently, sometimes after consultation with the sole or presiding arbitrator, the parties have no say in the matter.

In *Port Sudan Cotton Co v. Govindasamay Chettiear & Sons* [1977] 1 Lloyds' Rep 166, it was stated:

> There is a distinction between error and misconduct. To err in fact or law is not only human but an occupational hazard. Unless it is so often repeated as to give rise to some suggestion of incompetence it happily involves absolutely no reflection upon the person concerned, whether judge, umpire or arbitrator.

(e) There is much merit in the applicant's submission that PAM is the stakeholder and in the light of the dispute could have applied to interplead which would have protected itself and also secured the arbitrator's fees from the security deposit pending the court's determination.

[9] For reasons stated above, the plaintiff's application must be allowed with costs. The costs is fixed in the sum of RM5,000 to be payable by the defendant to the plaintiff. And the defendant to pay the plaintiff a sum of RM7,460 with interest at the rate of 8% per annum from the date of filing the suit until full realisation of the judgment sum with costs of RM5,000.

[10] I hereby order so.